

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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**NOV 13 2007**

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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Broadcast Localism )  
 )

MB Docket No. 04-233

TO: Marlene H. Dortch, Secretary

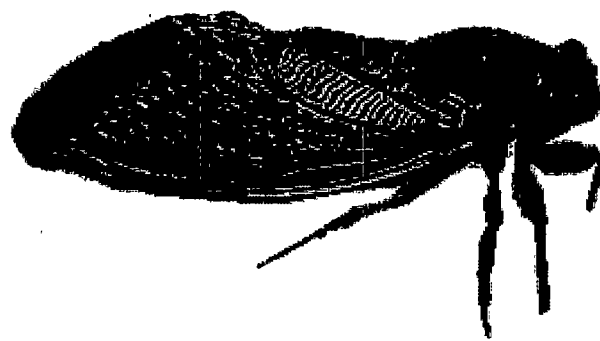
For transmission to: The Commission

**COMMENTS OF HARRY F. COLE AND PATRICK MURCK**

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November 13, 2007

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1. Commission concern about broadcast "localism" closely resembles the 17-year cicada in a number of respects. Both emerge after periods of dormancy lasting more than a decade, both generate considerable noise during their emergence, both tend to result in messes requiring clean-up activities well after each emergence has ended, and neither accomplishes much at all, other than to lay the groundwork for the next emergence.

2. We have had recent occasion to review the Commission's historical treatment of broadcast "localism" for the preparation of an extended law journal article about the subject. A copy of that article (included as Attachment A hereto) is incorporated herein and intended for consideration in the above-captioned proceeding. The primary purpose of our article was to examine what, if any, statutory basis exists for the Commission's oft-repeated claim that there exists some definite "obligation" to provide "local" programming. As set out in detail in the article, the fact is that there is no express statutory mandate relative to "local" service. And the history of the few very general statutory provisions to which the Commission has occasionally cited in support of its claims regarding "localism" – *i.e.*, Sections 307(c), 307(b) and 309(a) – does *not* support the notion that any statutory mandate currently exists or has ever existed. While the broad "public interest" language of the Act may be interpreted as according the Commission discretion to regulate with respect to "localism", whether or not to do so remains, at most, a matter of agency discretion, not Congressional dictate.

3. The fact that the Commission is under no external compulsion to take action in this area – and, therefore, that it can simply decline to act, if it so chooses – is important here in view of a historical fact which we identified in our research. Since the earliest days of the FCC – beginning even with its predecessor, the Federal Radio Commission – the agency has had periodic (every 10-15 years or so) occasion to wring its hands publicly about some perceived shortfall in "local"

programming. The result has consistently been the imposition of various reporting requirements supposedly designed to provide the Commission with more information about broadcasters' "local" performance. Implicit in those requirements has been the notion that the Commission would scrutinize the reported information carefully – and woe be unto those sorry broadcasters who fail to make the grade.

4. But history demonstrates that the reporting requirements imposed have simply led to substantially increased make-work chores for broadcasters and Commission staff alike, which chores produced no perceptible beneficial results which might justify their attendant burdens. Strikingly, virtually all of those make-work chores have been abandoned since the inception of the Commission's deregulation efforts in 1981, without any obvious, widespread, adverse effect directly ascribable to that abandonment.<sup>1</sup>

5. Further, even when the Commission has been presented with clear evidence of a licensee's poor "local" performance, history indicates that the Commission is still reluctant to penalize that performance in any meaningful way. In the very last comparative broadcast renewal proceeding, the incumbent renewal applicant was shown to have provided shop-at-home broadcasting – *i.e.*, essentially nothing but advertising and commercial promotions – on a 24/7 basis. No news, no public affairs aimed at ascertained local needs and interests. But just months before the challenged renewal application was filed, one of the strongest earthquakes ever recorded

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<sup>1</sup> We are aware of the one incident (involving a local emergency – in Minot, North Dakota, in 2002 – which was reportedly not covered by the local radio station in town with EAS responsibilities because the station was not locally staffed at night) which has been flogged repeatedly in a number of fora. But as far as we are aware, the various reporting requirements abandoned in the early 1980s would not necessarily have prevented that situation. And, more importantly, that incident is but one incident during a quarter century of deregulation. With some 15,000 broadcast stations in operation, a single particularly unfortunate incident over a 25-year period does not indicate any industry-wide breakdown – to the contrary, the isolated nature of that incident suggests that, in fact, the industry as a whole is doing a reasonably good job without the reporting requirements.

in the mid-Atlantic region struck the station's community of license, a community which had only that one television station licensed to it. The undisputed evidentiary record established that the incumbent renewal applicant – the only television licensee in that community – did not interrupt its home shopping programming to alert its audience to the earthquake or to issue any safety-related information.

6. This dismal performance was spelled out in detail in the record before the Commission. And yet, the Commission had no problem in renewing the station's license, even though in order to do so the Commission had to reject the competing application of a perfectly qualified challenger who was committed to providing the type of public service programming which the incumbent had consistently failed to provide. *See Reading Broadcasting, Inc.*, 17 FCC Rcd 14001 (2002).

7. So it appears that, while the Commission has from time to time imposed various reporting requirements, it is less enthusiastic about actually engaging in substantive evaluation of specific programming performance. That reluctance, most likely, arises from the undeniably complex and sensitive questions which would have to be answered before the Commission could even begin the evaluation process. Before the Commission could legitimately evaluate any programming showing, the Commission would have to define with a fair degree of precision just what it means by acceptable "local" programming, or "nonentertainment" programming, or "public affairs" programming, etc., etc. To date, the Commission has declined to engage in that baseline definitional exercise.<sup>2</sup> But without such threshold definitions, any reporting requirements are of no value, because the Commission would have no way to assess the information being reported.

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<sup>2</sup> In pre-deregulation days – *i.e.*, until the early 1980s – the Commission's rules referred broadly to "news, public affairs and other nonentertainment" programming, but those terms were not defined with any substantial precision. And as hard as it may have been to determine the precise metes and  
(Footnote continued on next page)

8. And even if there were useable definitions for all essential terms (*e.g.*, "local" or "nonentertainment"), review of the reported information would require careful and detailed analysis of the program reports in order to determine precisely whether the reporting station's programming in fact could be said to fit within those terms. That exercise would require staffing resources far beyond anything the Commission has ever enjoyed, much less the relatively pared-down staff currently available.

9. And even if there were useable definitions and adequate staff to perform the review, the Commission would have to establish substantive standards or limits for the reviewing staff to apply. How much "local" programming – however that term might be defined – would be required? What factors would be considered in determining whether any particular program, or combination of programs, would do the trick? And so forth.

10. Once you get to this point, you realize that such an exercise would require a dedication of agency resources far beyond anything the Commission has ever even pretended to commit to. And, perhaps more importantly, such an exercise would raise serious First Amendment problems. In order to make the myriad sensitive determinations which would be necessary for the type of program regulation regimen the Commission might envision here, the Commission would have to don the mantle of Federal Programming Evaluator. The agency would find itself in the business of deciding what is "news", what is "local", what is "enough" coverage of particular

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*(Footnote continued from preceding page)*

bounds of those terms in, say, 1980, developments in programming in the intervening quarter century have only aggravated that problem. Are programs like "Entertainment Tonight" or "TMZ" properly deemed "news", since they deal with current events, or are they merely "entertainment" because of the types of currents events with which they deal? How is that delineation to be made? By whom? What about talk shows – including, *e.g.*, the Imus in the Morning radio program, which historically included prominent politicians as guests, or the Oprah Winfrey television program, which similarly features prominent interviewees and discussions of "serious" topics – are these entertainment or not?

issues, etc., etc. *With all due respect, those are precisely the types of editorial determinations which* the First Amendment entrusts to private editors, and from which the First Amendment bars the government.

11. In view of these considerations, we suggest that the Commission's resources may be better utilized in activities other than the ceremonial "localism" dance which the Commission has performed repeatedly over its 70-year existence. Since the Communications Act does not require the Commission to do that dance, it is clearly well within the Commission's discretion to decline the opportunity. We recognize that, like the cicada's periodic appearance, the urge to publicly embrace "localism" may be an irresistible, genetically-engrained phenomenon. But while a cicada, emerging from its long dormancy, presumably cannot reflect on the experience of the generations of cicadas which have gone before, the Commission *can* do so. The agency has a long record of experience, duly reflected in decisions spanning the decades, which can provide useful guidance in the formulation of new policies. Before the Commission acts now, we urge it to review carefully its long history of periodic reporting requirements and to avoid the urge to repeat that history.<sup>3</sup>

12. In closing, we wish to emphasize that we recognize the importance of local broadcast service. Such service has been a hallmark of the broadcasting industry since its inception nearly a century ago, and it continues to be one of the most important distinctions between broadcasting, on the one hand, and other types of media delivery (*e.g.*, satellite- or Internet-delivered services)

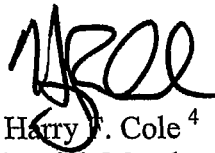
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<sup>3</sup> We note that, as communications attorneys, it is not necessarily in our own private, commercial interest to call the Commission's attention to its historic lack of meaningful success with reporting requirements. After all, the more such requirements the Commission mandates, the more billable work we will likely be called on to do. In other words, we should welcome with open arms the opportunity to review and advise on program log maintenance, community ascertainment surveys and the like. While we will of course take advantage of such opportunities if they present themselves, we still believe that everyone's time and energy — the Commission's, the industry's, and ours — would be more productively spent in other ways.

available to the public. We believe that every effort should be made to encourage the continued provision of local programming, and we salute the broadcast industry which, with very few exceptions, has provided and continues to provide such programming. But encouraging local programming is a far different exercise than attempting to require specific types and amounts of such programming.

13. Contrary to the Commission's suggestions, there is no express statutory provision mandating "localism". History demonstrates that when the Commission has imposed "reporting requirements", such requirements have had little if any demonstrable salutary effect. And any effort to go beyond mere reporting requirements would force the Commission into a Constitutionally impermissible role. We urge the Commission to bear these considerations in mind as it determines how best to allocate its own limited resources in the context of the above-captioned proceeding.

Respectfully submitted,



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November 13, 2007

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# THE MYTH OF THE LOCALISM MANDATE: A HISTORICAL SURVEY OF HOW THE FCC'S ACTIONS BELIE THE EXISTENCE OF A GOVERNMENTAL OBLIGATION TO PROVIDE LOCAL PROGRAMMING

Harry Cole<sup>†</sup> and Patrick Murck<sup>‡</sup>

## I. INTRODUCTION

"Localism has been a cornerstone of broadcast regulation for decades."<sup>1</sup> One could point to numerous decisions in which the Federal Communications Commission ("FCC" or "Commission") has solemnly intoned some version of that mantra to justify the notion that a broadcaster is under some obligation to provide locally-oriented programming "responsive to its community."<sup>2</sup> What does the Commission mean when it refers to this cor-

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1 In re Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12,425, ¶ 1 (July 7, 2004). [hereinafter *Localism Inquiry*].

2 Id. ¶ 3. See In re Children's Television Programming and Advertising Practices, Report and Order, 96 FCC2d 634, ¶ 45 (Dec. 22, 1984) (referring to "[t]he bedrock obligation of every broadcaster to be responsive to the needs and interests of its community"). See also In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Wickenburg and Salome, Arizona), Report and Order, 17 F.C.C.R. 7222, ¶ 4 (Apr. 10, 2002).

nerstone or bedrock concept of localism? More importantly, what is the basis for that concept and how has the FCC enforced it?

The history of broadcast regulation suggests that the concept of localism, as the FCC now expresses it, has, at best, no more than a marginal and indirect legislative basis. While repeatedly paying lip service to this idealized notion of localism, the Commission has time and again acted in near total disregard of a supposed localism obligation.

In 2004, prodded by reaction to its revised multiple ownership rules<sup>3</sup> (and to the supposed Pandora's boxful of evils which may have been unleashed by those rules), the Commission released a notice of inquiry ("*Localism Inquiry*") designed to explore the broad concept of localism.<sup>4</sup> Because of the dramatic, all-encompassing scope of the *Localism Inquiry*, it could be suggested that the inquiry was little more than a misdirection or diversion deployed by the Commission to placate its critics and was never likely to be concluded. With no action taken and none on the immediate horizon almost three years later, such criticism seems increasingly well founded.

But in January, 2007, it was reported that Chairman Kevin Martin had advised members of the Senate Commerce Committee that the Commission will complete the *Localism Inquiry* and release a report in that matter before the Commission completes its review of the media ownership rules.<sup>5</sup> Thus, not only may the conclusion of the *Localism Inquiry* be in the offing, but presumably, the Chairman expects that conclusion to affect the resolution of the ownership proceeding. Nonetheless, the Commission continues to use, in certain technical areas, non-technical policies that are based on assumptions derived from the FCC's idealized notion of localism.<sup>6</sup>

Since localism is expected to continue to be a factor in the FCC's decision-making processes for the foreseeable future—particularly ownership and channel allotment—a review of the reality, as opposed to the myth, of localism is now appropriate.

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<sup>3</sup> See *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitrary Survey Area, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620, ¶ 2 (June 2, 2003).

<sup>4</sup> *Localism Inquiry*, supra note 1, ¶ 7.

<sup>5</sup> John Eggerton, Martin Promises Localism Study Before Ownership Moves, *BROAD. & CABLE*, Jan. 8, 2007.

<sup>6</sup> *In re* Applications of Faye and Richard Tuck, Inc. KBEC, Waxahachie, Texas, Bluebonnet Radio Broadcasters, Inc. Plano, Texas, Century Broadcasting Corporation Garland, Texas, Dontron, Inc. KPBC, Garland, Texas, For Construction Permit for a New AM Station, *Memorandum Opinion and Order*, 3 F.C.C.R. 5374, ¶¶ 3–5 (Aug. 24, 1988).

## II. WHAT IS LOCALISM?—A WORKING DEFINITION

The precise definition of localism is difficult to articulate. In the Introduction to the *Localism Inquiry*, the Commission asserts that the agency has consistently held that "licensees must air programming that is responsive to the interests and needs of their communities of license."<sup>7</sup> The Introduction also refers to a broadcaster's "public interest obligation of providing programming that is responsive to its community."<sup>8</sup> From this we may conclude that when the Commission refers to localism it is referring to this obligation—the required airing of some kind of responsive programming directed specifically to a station's community of license.

But for a supposedly fundamental, bedrock obligation, this definition is vague. What, after all, does "responsive" mean? What types of "programming" will suffice? How much programming is enough? How must that programming be "directed" to the community? The Commission has historically failed to shed any light on those questions.

Perhaps the statutory source of localism could help illuminate the Commission's thinking. According to the *Localism Inquiry*, the "concept of localism derives from Title III of the Communications Act," both from the general "public interest, convenience and necessity" standard which appears in Sections 307(c) and 309(a) of the Communications Act of 1934 ("1934 Act") and also from Section 307(b), which explicitly requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."<sup>9</sup>

As a preliminary matter, the fact that the Commission refers generally to a monolithic Title III rather than citing specific statutory language indicates that there is no particular statutory basis for any government-imposed broadcast localism requirement. According to the Commission, the concept of localism "derives" from that broad authority. In other words, localism is not spelled out anywhere, but somehow springs up from the totality of the statute, or as some penumbras and emanations from the "public interest, convenience and necessity."

The Commission does refer specifically to Section 307(b), which mandates equitable distribution of broadcast licenses "among the several States and communities."<sup>10</sup> But that language does not require the Commission to

<sup>7</sup> *Localism Inquiry*, supra note 1, ¶ 1.

<sup>8</sup> *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Notice of Proposed Rule Making*, 15 F.C.C.R. 19,816, ¶ 3 (Sept. 14, 2000) (emphasis added).

<sup>9</sup> 47 U.S.C. § 307(b) (2000).

<sup>10</sup> *Localism Inquiry*, supra note 1, ¶ 2; see also § 307(b).

assign a specific community of license to each broadcast station.<sup>11</sup> Nor does that language refer in any way to programming of any sort, much less to programming which is somehow responsive to a station's community of license.

Of course, the statutory "public interest, convenience and necessity" standard provides the Commission with considerable interpretative latitude. It is certainly possible that the notion of localism might be deemed a permissible agency interpretation of the scope of its authority, but the language of the Communications Act does not explicitly mandate localism requirements as articulated by the Commission.<sup>12</sup> Thus, a review of localism must begin with the notion, as expounded by the Commission, that that term refers to an obligation that broadcasters "air programming that is responsive to the interests and needs of their communities of license."<sup>13</sup>

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<sup>11</sup> The concept of a "community of license"—i.e., a community to which a broadcast station is assigned and to which that station owes some special obligation—is not defined, or even generally outlined, in Title III of the 1934 Act. The phrase "community of license" appears only once in Title III in a narrow section that was added in 1991. 47 U.S.C. § 331(b) (relating to technical service to be provided by certain AM stations). The Commission itself has acknowledged that the 1934 Act does not require that each station be limited to a single community of license. *In re* Amendment of Part 3 of the Rules and Regulations Governing Main Studio and Station Identification of the Television Broadcast Stations, *Report and Order*, 22 F.C.C. 1567 (Mar. 13, 1957).

<sup>12</sup> The source of the Commission's authority to regulate any programming is similarly non-specific. That authority has been held by the U.S. Court of Appeals for the District of Columbia Circuit to be based on the public interest language of Sections 307(a) and (d) of the 1934 Act, in connection with the FCC's authority to grant and renew broadcast licenses. *See* *Office of Comm'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1427-28 (D.C. Cir. 1983). In that case (which involved review of the FCC's 1981 decision deregulating the commercial radio industry), the Commission had characterized an overall obligation to provide public interest programming—an obligation similar to but seemingly a bit broader than localism—as non-statutory. *See In re Deregulation of Radio, Report and Order (Proceeding Terminated)*, 84 F.C.C.2d 968, 977 (Jan. 14, 1981). In a footnote, the Court asserted that the FCC's characterization was an error, and that the public interest standard "clearly imposes statutory nonentertainment programming obligations on licensees." *Office of Comm'n of United Church of Christ*, 707 F.2d at 1429 n.46. However, apart from the general public interest standard, the Court pointed to no specific statutory provision addressing any particular programming obligations of any sort. The Court's facile assertion of some "clear[ ] . . . statutory" basis for programming regulation may be read, in *Chevron* terms, to indicate that the Communications Act affords the Commission discretion to regulate programming in the public interest if the Commission deems such regulation appropriate—a *Chevron* II analysis. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984) (holding that where Congress is silent an administrative agency's construction of an ambiguous statute is accorded deference as long as the agency's interpretation is reasonable). By contrast, it seems clear that the vague language of the Communications Act could not support a determination that the FCC is under a clear and unequivocal *Chevron* I mandate to engage in such regulation.

<sup>13</sup> Localism Inquiry, *supra* note 1, ¶ 7.

### III. LOCALISM—IN THE BEGINNING

As noted above, the broad public interest language of Title III of the 1934 Act includes no language which directs the Commission to consider community of license in any way in its broadcast licensing activities. But Section 307(b), also specifically referenced by the Commission in the *Localism Inquiry*, mandates equitable distribution of radio service among the "several States and communities."<sup>14</sup> Perhaps the history of Section 307(b) may shed some light on the source of the localism obligation.

#### A. The Federal Radio Act and the Davis Amendment

The Federal Radio Act of 1927<sup>15</sup> ("1927 Act") was the precursor to the 1934 Act. Closely resembling what is now Section 307(b), section nine of the 1927 Act provided:

In considering applications for licenses and renewal of licenses, when and insofar as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient and equitable radio service to each of the same.<sup>16</sup>

Like Section 307(b), that section made no reference to any programming obligation. Nor did it provide that individual broadcast stations would be tied to specific communities of license. It merely directed the "fair, efficient and equitable"<sup>17</sup> distribution of radio service among the different States and communities.

While the 1927 Act did include reference to communities, the Federal Radio Commission ("FRC"), established by the 1927 Act appears to have read section nine as directing distribution of broadcast licenses by state. Then Chairman William H.G. Bullard wrote in August 1927, that "the commission is quite aware of the section of the Federal Radio Act of 1927 which intimated that stations should be allotted on an equitable basis among States, and that is one of the dominating features of the action of the commission at this time."<sup>18</sup> Note that Bullard referred only to states and not to communities. Note also Bullard's use of the verb "intimated," which strongly suggests that he, for one, did not read section nine of the 1927 Act to provide clear and unequivocal instruction to the FRC on this point.

Congress agreed in 1928 when it passed the Davis Amendment,<sup>19</sup> a provision which amended section nine and directed the FRC to "make a fair

<sup>14</sup> See *Localism Inquiry*, supra note 1, ¶ 2; see also § 307(b).

<sup>15</sup> Federal Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

<sup>16</sup> *Id.* § 9, 1166.

<sup>17</sup> *Id.*

<sup>18</sup> 1928 FRC ANN. REP. 1, 82 [hereinafter SECOND ANNUAL REPORT] available at <http://www.fcc.gov/fcc-bin/assemble?doeno=2810262> (emphasis added).

<sup>19</sup> Radio Act Amendments, Pub. L. No. 70-195, 45 Stat. 373 (1928).

and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories, and possessions of the United States within each zone,<sup>20</sup> according to population.<sup>21</sup> Congress strongly indicated that its intended geographical focus for broadcast allotments was the state or zone, not the individual community by deleting "communities" from the statutory directive concerning allotment of broadcast service.

The 1927 Act included a provision which divided the country into five geographical zones.<sup>22</sup> Through an elaborate quota system developed pursuant to the Davis Amendment, broadcast services were to be distributed by the FRC among the states and zones according to "quota units" of broadcast facilities.<sup>23</sup> The Davis Amendment changes to section nine of the 1927 Act specified that "[a]lllocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."<sup>24</sup> Pursuant to that language the FRC adopted *General Order No. 28* on April 20, 1928, which provided that allocations were to be charged to the state (or district, territory, or possession) where the station's studio was located. But the FRC went further, holding in *General Order No. 28* that:

[N]o broadcasting station shall move its studio outside of the borders of the State, District, Territory, or possession in which it is located without first making written application to the commission for authority to so move studio and securing written permission from the commission for such removal. This order does not apply to transfer or removals of studios within the borders of the same State, District, Territory, or possession.<sup>25</sup>

So while a station's location—the closest the 1927 Act comes to the notion of community of license—was to be determined by the site of the station's studio, *General Order No. 28* freed the station's licensee to move that studio—and, therefore, its location—anywhere in the state without prior FRC approval. Clearly, a station's precise location, or community of license, was not of particular concern, so long as the FRC knew which state the station was in.

<sup>20</sup> Under Section two of the 1927 Act, the country was divided into five zones. H.R. 9917, 169th Cong. § 2 (1927). Each of the five FRC Commissioners was assigned responsibility for one of the zones. H.R. 9971 § 3.

<sup>21</sup> Radio Act Amendments, Pub. L. No. 70-195, § 5, 45 Stat. 373 (1928) (amending section nine of the 1927 Act).

<sup>22</sup> Federal Radio Act of 1927, Pub. L. No. 69-632, § 2, 44 Stat. 1162-63.

<sup>23</sup> The quota units to which each state or zone was entitled were subject to change based on, inter alia, updated census information which changed the relative populations among the states and zones. See 1932 FRC ANN. REP. 1, 25-27, available at <http://www.fcc.gov/fcc-bin/assemble?docno=3212051>.

<sup>24</sup> Radio Act Amendments, Pub. L. No. 70-195, § 5, 45 Stat. 373 (1928) (amending section nine of the 1927 Act).

<sup>25</sup> SECOND ANNUAL REPORT, *supra* note 18, at 44, available at <http://www.fcc.gov/fcc-bin/assemble?docno=2810261>.

In late 1930, the FRC revisited *General Order No. 28* to prevent relocation of a station's "main studio outside of the borders of the city, State, District, Territory, or possession in which it is located" without prior approval of the FRC.<sup>26</sup> The FRC further defined the term "main studio" to be the studio "from which the majority of the local programs originate and from which a majority of station announcements are made of programs originating at remote points."<sup>27</sup> But the Davis Amendment still limited the focus of allocation to states or zones, and that limitation remained in effect through the life of the FRC. It can therefore be concluded that section nine of the 1927 Act—the antecedent of Section 307(b)—did not give rise to any obligatory notion of localism.<sup>28</sup>

Moreover, the FRC provided no indication that the general public interest, convenience, or necessity language of the 1927 Act imposed any obligation to provide locally-oriented programming, despite the fact that several sections of the 1927 Act contained the public interest, convenience, or necessity standard (as is the case with the 1934 Act). In a statement issued August 23, 1928 on the subject of that statutory language, the FRC made no mention of any obligation to provide locally-oriented programming.<sup>29</sup> The FRC did acknowledge that a licensee's programming performance would be considered in connection with any applications for modification or renewal of licenses, but never suggested that programming responsive to local needs and interests might be deemed a material, let alone obligatory, element.<sup>30</sup>

<sup>26</sup> 1931 FRC ANN. REP. 1, 84, available at <http://www.fcc.gov/fcc-bin/assemble?docno=3112072>. The FRC revisited *General Order No. 28* in its *General Order No. 98*, which was adopted October 27, 1930.

<sup>27</sup> *Id.*

<sup>28</sup> The FRC was, of course, aware of the programming practices of various licensees because they proffered their programming performance in support of applications for improved facilities and/or renewal of license. But there is no indication that the FRC deemed the provision of local programming to be a *sine qua non* to the grant of such applications. See also Kristine Martens, Comment, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. LAW 285, 293 (2004) (arguing that in the early days of radio large commercial stations were more likely to secure licenses than emerging, small stations because more people could listen to the larger, more powerful stations).

<sup>29</sup> SECOND ANNUAL REPORT, *supra* note 18, app. F(6) at 166–70.

<sup>30</sup> *Id.* The FRC report listed some examples of programming performance that would be considered. Generally, the FRC viewed the broadcast of phonograph records as undesirable. "A station which devotes the main portion of its hours of operation to broadcasting such [ordinary commercial type] phonograph records is not giving the public anything which it can not readily have without such a station." *Id.* at 168. But the FRC stopped short of banning such broadcasts altogether. *Id.* ("[T]he commission will not go so far at present as to state that the practice is at all times and under all conditions a violation of" the public interest standard.). The FRC was also skeptical of advertising and commercially-supported programming. "Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public." *Id.* But again, the FRC allowed itself to be persuaded in some instances that "there seems to exist a strong sentiment in favor of such advertising on the part of the listening public." *Id.* The FRC curiously singled out Iowa as a

In practice, the FRC articulated no localism obligation. When the FRC did identify an applicant who had provided only minimal locally-oriented programming, the FRC declined to revoke its license, although it reduced the station's operating power.<sup>31</sup> When the FRC identified a station which had "devoted itself to furnishing wholesome amusement and information" and was "distinctly a community proposition," the FRC renewed its license, but with the caveat that "a station such as this could not expect to enjoy a large assignment of power, but should be allowed to continue in serving the community as it has been doing in the past."<sup>32</sup> In other words, while renewal applicants could seek to rely on their past programming, the FRC gave no indication that some level of programming responsive to local needs and interests was even necessarily expected, much less required, of broadcasters. Thus, the 1927 Act and the FRC's interpretation of that Act do not provide any support for the notion that the FCC now refers to as localism.

The 1934 Act replaced the 1927 Act and established the FCC in place of the FRC.<sup>33</sup> Section 307(b) of the 1934 Act was effectively identical to section nine of the 1927 Act, as that act had been amended in 1928.<sup>34</sup> That is, Section 307(b) of the 1934 Act preserved the Davis Amendment's zone-quota system, providing that:

[T]he people of all zones established by this title are entitled to equality of radio-broadcasting service, both of transmission and of reception, and in order to provide said equality the Commission shall as nearly as possible make and maintain an equal

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place which had demonstrated such "strong sentiment." Finally, a "word of warning" was given "where two rival broadcasters in the same community spend their time in abusing each other over the air." *Id.* at 169. The FRC found such programming "not only uninteresting but also distasteful to the listening public." *Id.*

Examples of situations in which the FRC declined to renew licenses on the basis of programming include *KFKB Broad. Ass'n. v. Fed. Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931), and *Trinity Methodist Church, S. v. Fed. Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932). Those cases did not involve a failure to provide adequate local programming, but rather the broadcast of programming which the FRC found to be affirmatively contrary to the public interest.

<sup>31</sup> SECOND ANNUAL REPORT *supra* note 18, at 155-56, (discussing Station WCRW). According to the FRC, some three-quarters of the station's programming was devoted to the broadcasting of phonograph records, and "a large part of the program[ming] [was] distinctly commercial in character." *Id.* at 156. While the licensee "attempt[ed] . . . to show a very limited amount of educational and community civic service, . . . the amount of time thus employed is negligible and the evidence of its value to the community is not convincing." *Id.* The FRC then concluded that "[m]anifestly this station is one which exists chiefly for the purpose of deriving an income from the sale of advertising of a character which might be objectionable to the listening public and without making much, if any, endeavor to render any real service to that public." *Id.* Despite this harsh evaluation, the licensee was allowed to continue broadcasting. *Id.* at 155.

<sup>32</sup> *Id.* at 159.

<sup>33</sup> Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064.

<sup>34</sup> Compare Radio Act Amendments, Pub. L. No. 70-195, 45 Stat. 373 (1928) with Communications Act of 1934, Pub. L. No. 73-416, § 307(b), 48 Stat. 1064, 1084.



allocation of broadcasting licenses, of bands of frequency, of periods of time for operation, and of station power to each of said zones when and insofar as there are applications therefor; and shall make a fair and equitable allocation of licenses, frequencies, time for operation, and station power to each of the States and the District of Columbia, within each zone, according to population.<sup>35</sup>

By May 1935, when bill S. 2243 was introduced to repeal the Davis Amendment, it was apparent to Congress and the FCC that the zone-quota system of channel allotments was simply not workable.<sup>36</sup> In a letter to the Chairman of the Senate Committee on Interstate Commerce, FCC Chairman Anning S. Prall expressed the Commission's "heartly accord" with the proposed bill, observing that the Davis Amendment "is very difficult of administration and cannot result in an equality of radio broadcasting service."<sup>37</sup> Congress enacted the bill June 5, 1936,<sup>38</sup> amending Section 307(b) to its present language and thereby eliminating the zone-quota system which had set the allotment criteria for more than eight years.

#### B. Chain Broadcasting and the Network Effect

By then, however, the Commission was becoming aware of the distinctly non-local effect of the radio broadcast industry's reliance on network programming. In March 1938, the Commission commenced an extensive study of the effects of such programming. That study culminated in the 1941 *Report on Chain Broadcasting*,<sup>39</sup> and the adoption of Chain Broadcasting Regulations which were affirmed by the Supreme Court in *National Broadcasting Co. v. United States*.<sup>40</sup>

In view of its concern about the threat of non-local network dominance, the Commission could have used the *Report on Chain Broadcasting* proceeding to articulate a local programming obligation, whether derived from statute or other authority. If this local programming obligation existed, its performance would be impeded by the type of excessive network dominance resulting from simultaneous chain broadcasts. If private network arrangements were found to be interfering with some government-imposed local programming obligation, the agency charged with enforcing that obligation would presumably have cited chain broadcasting as an obstacle.

<sup>35</sup> Communications Act of 1934, Pub. L. No. 73-416, § 307(b), 48 Stat. 1064, 1084.

<sup>36</sup> S. 2243, 73rd Cong. (1934) (enacted).

<sup>37</sup> Tyler Berry, *Communications by Wire and Radio* 134 (1937) (citations omitted).

<sup>38</sup> Communications Act of 1934 § 307(b) (codified as amended at 47 U.S.C. § 307(b) (2000)).

<sup>39</sup> Fed. Comm'n Comm'n, *Report on Chain Broadcasting* (1941) [hereinafter *Report on Chain Broadcasting*].

<sup>40</sup> 319 U.S. 190 (1943). Chain broadcasting was defined in § 3(p) of the 1934 Act as the "simultaneous broadcasting of an identical program by two or more connected stations." Communications Act of 1934, § 3(p).

But the FCC stopped well short of articulating a local programming obligation. Instead, the Commission offered the following:

With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the network practices disclosed by the investigation] has been that *broadcasting service has been maintained at a level below that possible under a system of free competition.*<sup>41</sup>

While this reflects the Commission's reliance on the public interest standard to justify its regulation of programming (including network programming not originated by any particular Commission licensee), the FCC's statement did not establish that there was a government-imposed programming obligation. Rather, the FCC referred only to a theoretical level of broadcasting service which might be possible "under a system of free competition."<sup>42</sup>

The Commission expressed that sentiment elsewhere in the *Report on Chain Broadcasting* as well. Chain Broadcasting Regulation 3.104 limited the extent to which networks could tie up "optional time"—time during which the networks could, upon twenty-eight days notice, insist that the local affiliated station air network programming. Since the time in question would, absent exercise of the option by the network, be available to the local station for local programming, the Commission was critical of such option time provisions. According to the FCC, rescheduling a local program in order to accommodate the network's option

may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions.<sup>43</sup>

This statement makes clear that the FCC believed that locally-oriented programming was an important aspect of a broadcaster's service to the public. But the statement again stopped short of suggesting that the provision of such programming was in any way required. To the contrary, the Commission said that broadcasters *should* be prepared to serve community needs with local programming—not that they were required to do so. In the

<sup>41</sup> REPORT ON CHAIN BROADCASTING, *supra* note 39, at 81–82 (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 63, 65.

final sentence of the quoted passage, the Commission drew no distinction between local and national programming which could be inhibited by option time provisions.

The introduction to the *Report on Chain Broadcasting* reflected this egalitarian treatment of local and network programming, where the Commission stated:

If radio broadcasting is to serve its full function in disseminating information, opinion, and entertainment, it must bring to the people of the nation a diversified program service. There must be, on the one hand, programs of local self-expression, whereby matters of local interest and benefit are brought to the communities served by broadcast stations. There must be, on the other hand, access to events of national and regional interest and to programs of a type which cannot be originated by local communities. Neither type of program service should be subordinated to the other.<sup>44</sup>

In the quest for the origins of localism, it appears that the notion of some specific local programming obligation had not been identified by the Commission as of the *Report on Chain Broadcasting*. Again, the Commission recognized that some "programs of local self-expression" were an essential element of a broadcaster's "full function,"<sup>45</sup> but the Commission stopped well short of providing any specific meaning to that vague precautionary expression.

#### IV. FORM BUT NO SUBSTANCE

From its earliest days the FCC did suggest that it was interested in the extent to which applicants for new broadcast licenses were familiar with and intended to serve local interests and needs. For example, in its broadcast licensing activities, the Commission inquired into the extent to which applicants were familiar with their proposed communities of license.<sup>46</sup> But once an applicant convinced the FCC that the applicant really might do a good job of serving the local listenership, the Commission engaged in virtually no follow-up to confirm that such service was in fact provided.<sup>47</sup>

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., *In re H.K. Glass and M.C. Kirkland (New)*, Eustis, F.L., *For Construction Permit*, Lake Region Broadcast Company (New), Lakeland, F.L., *For Construction Permit*, Robert Louis Sanders (New), Palm Beach, F.L., *For Construction Permit*, Hazlewood, Inc. (New), West Palm Beach, F.L., *For Construction Permit*, 2 F.C.C. 365, 372 (Mar. 3, 1936); *In re J. Lawrence Martin*, Tucumcari, N.M., *For Construction Permit*, Docket No. 3316, 3 F.C.C. 461, 462 (Nov. 10, 1936); *In re Eugene DeBogory*, trading as Brownsville Broadcast Company, Brownsville, T.X., *For Construction Permit*, Denton Broadcast Company, Eugene DeBogory, Owner, Denton, T.X., *For Construction Permit*, 2 F.C.C. 336, 340 (Feb. 21, 1936).

<sup>47</sup> Indeed, in 1935, when the sale of a broadcast license was proposed, the FCC did not even ask the proposed purchaser about its intended program service. FED. COMM'NS COMM'N, PUBLIC SERV. RESPONSIBILITY OF BROAD. LICENSEES 7 (1946) [hereinafter BLUE BOOK].

License renewal applicants had been asked, as early as 1928, to disclose the amounts of certain types of programming they had provided during the preceding license term.<sup>48</sup> The goal of the Commission was to assure a "well-balanced program structure" which was "essential" to broadcasting in the public interest.<sup>49</sup> But such showings were routinely ignored.

#### A. The Blue Book

As Chairman Paul A. Porter described the situation in an address to the National Association of Broadcasters in March, 1945:

Briefly the facts are these: an applicant seeks a construction permit for a new station and in his application makes the usual representations as to the type of service he proposes. These representations include specific pledges that time will be made available for civic, educational, agricultural and other public service programs. The station is constructed and begins operations. Subsequently the licensee asks for a three-year renewal and the record clearly shows that he has not fulfilled the promises made to the Commission when he received the original grant. The Commission in the past has, for a variety of reasons, including limitations of staff, automatically renewed these licenses even in cases where there is a vast disparity between promises and performance.<sup>50</sup>

This candid acknowledgement led to a detailed review of the Commission's standards for renewal of broadcast licenses. The results of that review were set out in the FCC's *Public Service Responsibility of Broadcast Licensees* ("Blue Book")—an extensive study that underscored the truth of Porter's words. The *Blue Book* listed multiple instances in which the actual programming performance of licensees could have justified denial of renewal and yet the licenses were renewed anyway.<sup>51</sup>

<sup>48</sup> Renewal applicants were asked to state the average percentage of time per month devoted to either commercial or sustaining (i.e., noncommercial) programs in the following categories:

(1) Entertainment; (2) [e]ducational; (3) [r]eligious; (4) [a]gricultural; (5) [c]ivic (includ [sic] in this item fraternal, Chamber of Commerce, charitable and other civic but non-governmental programs); (6) [g]overnmental (includ [sic] in this item all municipal, state and federal programs, including political or controversial broadcasts by public officials, or candidates for public office, regardless of whether the programs so included under this item are entertainment, educational, agricultural, etc., in character); (7) [n]ews; (8) \_\_\_\_\_ [sic]; (9) [t]otal.

*Id.* at 13 n.1 (internal quotations omitted). Note that the precise nature and extent of particularly local programming is not included in the listed categories.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> One example cited by the *Blue Book* is particularly striking. A station sought authority to operate at night, arguing that it would thereby be able to provide to its community of license a "local program service" not otherwise available at night. The Commission granted the application. Within eight months the station had affiliated with a national network and, within five years, "the 'local' programs upon which [the applicant] had relied were conspicuous by their absence." *Id.* at 6. The Commission observed that, "[i]n contrast to [the applicant's] allegations that time after 6 p.m. was sought for local public service, the

Defensively, the Commission asserted that it had "given repeated and explicit recognition to the need for adequate reflection in programs of local interests, activities and talent."<sup>52</sup> It also pointed to its adoption of Chain Broadcasting Regulation 3.104, which was intended "*to foster the development of local programs.*"<sup>53</sup> But the Commission also admitted that Regulation 3.104 had been a failure in that regard.<sup>54</sup> The Commission ultimately concluded that "the soundness of a local program policy does not rest solely on the consistent Commission policy of encouraging a reasonable proportion of local programs as part of a well-balanced program service."<sup>55</sup>

When looking for the origins of localism, that ultimate conclusion is significant. It reflects that the view of the *Blue Book* Commission was that the provision of some level of local programming was merely the subject of a policy of encouragement, and not a matter of specific, express regulatory obligation. Even while the FCC opined that "[a] positive responsibility rests upon local stations to make articulate the voice of the community,"<sup>56</sup> the Commission was admitting that the "statistics of local programming during [the 'front page hours' of 6-11 p.m.], or generally, are not impressive."<sup>57</sup>

But having made this concession, the Commission failed to flex its expansive public interest regulatory muscle and impose some affirmative obligation designed to reverse the unimpressive amount of local programming.

The FCC first assigned "[p]rimary responsibility for the American system of broadcasting" to broadcast licensees and the networks. "It is to the stations and networks rather than to federal regulation that listeners must primarily turn for improved standards of program service."<sup>58</sup> While the FCC did acknowledge that it had some role to play, it characterized that role as subordinate. "The Commission, as the licensing agency established by Congress, has a responsibility to consider overall program service in its public interest determinations, but affirmative improvement of program service must be the result primarily of other forces."<sup>59</sup>

This is not to say, however, that the Commission did nothing. While continuing to require renewal applicants to describe their programming performance, the FCC committed to make appropriate modification of its

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station broadcast only 20 minutes of local live sustaining programs after 6 p.m. during the entire week [studied by the FCC]—10 minutes of bowling scores and 10 minutes of sports news." *Id.*

<sup>52</sup> *Id.* at 37.

<sup>53</sup> *Id.* (internal quotations omitted).

<sup>54</sup> *Id.* at 3 n.3.

<sup>55</sup> *Id.* at 37.

<sup>56</sup> *Id.* at 39.

<sup>57</sup> *Id.* at 38.

<sup>58</sup> *Id.* at 54.

<sup>59</sup> *Id.* at 54-55.

forms and procedures and to undertake "a generally more careful consideration of renewal applications."<sup>60</sup> The Commission thus eschewed the opportunity to articulate, codify, and enforce a specific local programming obligation. Instead, it embraced a far less direct "promise versus performance" approach. Applicants for initial or modified authorizations would provide certain types and amounts of programming in their applications, and their actual programming performance would be compared with those promises at renewal time.

In essence, that approach had been in place for more than a decade already and, as the *Blue Book* unquestionably demonstrated, that approach had been largely unsuccessful up to that point. But in a triumph of hope over experience (much like a second marriage), the 1946 Commission committed to giving that approach another shot. This time, however, the Commission would improve its application forms and make definitions of various common terms in those forms more consistent with applicable policies.

As a practical matter, however, the Commission failed to explain exactly how those changes would alter the ultimate decision-making process vis-à-vis renewal applications. In the *Blue Book's* concluding section (supposedly explicating its approach to "Action on Renewals"), the Commission merely described in general terms the various types of data it expected to have available through the renewal process.<sup>61</sup> Those descriptions were not especially detailed or informative, but at least they appeared to lay a foundation on which the Commission might develop a detailed approach to the agency's practical assessment of those data in the renewal context.

The Commission, however, did not do this. Instead, the Commission concluded the *Blue Book* with the following: "If the Commission is able to determine on the basis of the data thus available that a grant will serve the public interest, it will continue as heretofore, to grant forthwith; otherwise, as heretofore, it will designate the renewal application for hearing."<sup>62</sup> The broadcast industry could be forgiven if it did not read that as a declaration of a specific local programming obligation. The *Blue Book's* conclusion

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<sup>60</sup> *Id.* at 56.

<sup>61</sup> The data identified by the Commission were: (1) "all the data concerning engineering, legal, accounting and other matters, as heretofore;" (2) a "responsible estimate of the overall program structure appropriate for the station in question, as estimated by the licensee himself when making his previous application;" (3) the licensee/applicant's "affirmative representations," or promises, "concerning time to be devoted to sustaining programs, live programs, discussion programs, and advertising matter;" (4) data from annual reports concerning the station's actual programming performance during composite weeks from each year of the license term; (5) "a statement of the overall program structure of the station during a week immediately preceding the filing of" the license renewal application; and (6) "the station's representations concerning program service under the license applied for." *Id.* at 58-59.

<sup>62</sup> *Id.* at 59.

appeared to be little more than a restatement of business as usual. The Commission reaffirmed its belief that local programming was in the public interest; it expected that applicants would set out their programming proposals; and it intended to compare those proposals against actual program performance as demonstrated in renewal applications. While the definitions of particular program-related terms might be made more precise in the interest of uniformity and consistent analysis, the most important questions were left unanswered. How, and according to what standards or benchmarks, would the Commission evaluate programming performance? The Commission did attempt to develop various rules which might indirectly assure that broadcasters were providing local service to their respective communities of license. But those rules still stopped short of any specific localism requirement.

#### B. Program Origination

One focal point for the Commission was the main studio rule. As indicated above, the 1927 Act had identified a broadcast station's location as the site of its studio.<sup>63</sup> By 1949, however, the Commission had recognized that the main studio rule then in effect led "to meaningless results,"<sup>64</sup> and commenced a rulemaking proceeding in 1948 to revise the definition of main studio.<sup>65</sup> That proceeding was resolved in 1950.<sup>66</sup>

In *Program Origination*, the Commission noted that a station's "location includes both transmitter and studio location and for many purposes the latter is the more significant."<sup>67</sup> The Commission cited Section 307(b)'s requirement of "fair, efficient and equitable distribution of radio service" and explained that, in that context, the term radio service "comprehends both transmission and reception service."<sup>68</sup> The Commission continued:

Transmission service is the opportunity which a radio station provides for the development and expression of local interests, ideas, and talents and for the production of radio programs of special interest to a particular community. . . . It is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. . . . [A] station cannot serve as a medium for local self ex-

<sup>63</sup> See *supra* note 24 and accompanying text.

<sup>64</sup> *In re Application of Pawtucket Broad. Co. (WFCI) Pawtucket, Rhode Island For Modification of License*, 4 Rad. Reg. 2d (P&F) 1345, 1352 n.5 (Apr. 15, 1949).

<sup>65</sup> At the time, Section 3.12 defined a station's main studio as "the studio from which a majority of [the station's] local programs originate, and/or from which a majority of its station announcements are made of programs originating at remote points." *Id.* at 1352 (internal quotations omitted).

<sup>66</sup> *In re Promulgation of Rules and Regulations Concerning the Origination Point of Programs of Standard and FM Broadcast Stations*, 1 Rad. Reg. 2d (P&F) 91:465 (Dec. 13, 1945) [hereinafter *Program Origination*].

<sup>67</sup> *Id.* at 571.

<sup>68</sup> *Id.*

pression unless it provides a reasonably accessible studio for the origination of local programs.

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It is apparent that § 307(b) and the Commission's efforts to apply it may be largely frustrated if, after a station is licensed for the purpose of providing both reception and transmission service to a particular community, it removes its main studio to a distant point and originates all or substantially all of its programs in a city or town other than that which it was licensed to serve. Such action on the part of the station may substantially cut away the basis of the Commission's decision authorizing the establishment of the station.<sup>69</sup>

This passage contains several different elements related to the development of the localism concept. First, the Commission tied Section 307(b) to the notion of "transmission service," as distinct from "reception service." The Commission clearly felt that its mandate to provide fair, efficient and equitable distribution of radio service required it to provide transmission service to particular localities in some fashion.

Second, the Commission provided a definition of transmission service: "the opportunity which a radio station provides for the development and expression of local interests, ideas, and talents and for the production of radio programs of special interest to a particular community."<sup>70</sup> Note, however, that the Commission spoke only in terms of the opportunity that establishment of a radio station provided, not any statutorily-compelled duty on the part of any licensee actually to fulfill such opportunity.

Third, the Commission acknowledged implicitly that its former main studio rule—which tethered each station to its own particular community and afforded that local community the potential opportunity for self-expression—was completely ineffective at accomplishing such tethering.<sup>71</sup> The Commission recognized that under its former rule (which was still in effect at the time of *Program Origination*), a licensee could "remove[ ] its main studio to a distant point and originate[ ] all or substantially all of its programs in a city or town other than" its community of license, thereby "largely frustrat[ing]" the Commission's efforts to apply Section 307(b).<sup>72</sup>

Concluding its deliberations in *Program Origination*, the Commission amended its main studio rule. But in so doing, it did not impose any obligations relating to the provision of programming directed to the community of license. Instead, it merely required that stations originate a majority of their programs—or, for network-affiliated stations, the lesser of: (a) a majority of all their programs; or (b) two-thirds of their non-network programs—from their main studios. While the Commission may have hoped, or even expected, that such a requirement would automatically spawn locally-oriented (as opposed to locally-originated) programming, the rule as

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



adopted did not demand, or even allude to, such programming. By adjusting downward the program origination obligation of network affiliates, the Commission seemed to return to the position articulated in the *Report on Chain Broadcasting* that local programming should not be subordinated to network programming, and vice versa.<sup>73</sup>

### C. En Banc Programming Inquiry

A decade later, the Commission again undertook a comprehensive review of the programming obligations of broadcasters.<sup>74</sup> Motivated by a 1955 study of network television practices, the Commission focused on:

[1] whether the general standards heretofore laid down by the Commission for the guidance of broadcast licensees in the selection of programs and other material intended for broadcast are currently adequate; [2] whether the Commission should, by the exercise of its rulemaking power, set out more detailed and precise standards for such broadcasters; [3] whether the Commission's present review and consideration in the field of programming . . . are adequate, under present conditions in the broadcasting industry.<sup>75</sup>

In several respects, the conclusions of the *En Banc Programming Inquiry* proved to be mere re-plays of the *Blue Book*, which preceded it by fourteen years. Again, the Commission asserted that a "significant element of the public interest is the broadcaster's service to the community."<sup>76</sup> Referring to the reception/transmission service dichotomy which it found inherent in Section 307(b), the Commission said that the "end objective" of providing transmission service was to "provid[e] a new or additional 'outlet' for broadcasting from a community, area or state. Implicit in . . . [this transmission service] alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required."<sup>77</sup>

The Commission expanded this somewhat, stating that:

The initial and principal execution of [the public interest, convenience and necessity] standard, in terms of the area [the broadcast licensee] is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent,

<sup>73</sup> REPORT ON CHAIN BROADCASTING, *supra* note 39, at 81-82.

<sup>74</sup> Fed. Comm'n Comm'n, Report and Statement of Policy Res: Commission En Banc Programming Inquiry 2303 (1960) [hereinafter *En Banc Programming Inquiry*].

<sup>75</sup> *Id.* at 2304.

<sup>76</sup> *Id.* at 2310. While the Commission again concluded that the public interest standard afforded it the general authority to regulate the nature of the service provided by broadcasters, it specifically acknowledged that "[t]hus far Congress has not imposed by law an affirmative programming requirement on broadcast licenses." *Id.* at 2312 (quoting testimony of Chairman Frederick W. Bord before the Senate Subcommittee on Communications on May 16, 1960). This further confirms the observation that there is no express statutory basis for any programming obligation, including one involving localism.

<sup>77</sup> *Id.* at 2311. But note that the Commission spoke in terms of a local outlet not for a community, but for a "community, area or state." Again, the Commission did not mandate programming directed to the licensee's community of license alone.

positive and continuing effort by the licensee to discover and *fulfill the tastes, needs and desires of his service area.*<sup>78</sup>

And later still, the FCC noted that the "broadcaster is *obligated* to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and *to provide programming to meet those needs and interests.*"<sup>79</sup> "[T]he Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve and to provide programming which in fact constitutes [sic] a diligent effort, in good faith, to provide for those needs and interests."<sup>80</sup>

So, while it was echoing themes hinted at its earlier history, the Commission seemed to be venturing closer than it previously had to some substantive programming obligation. But having offered up these general statements, the Commission performed an about-face and disclaimed any regulatory obligation to provide any particular programming. The Commission stated that its intention was not "to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve."<sup>81</sup> The Commission was only willing to describe another indirect mechanism which it hoped would lead to appropriate public interest programming.

What the Commission proposed was a process of "assiduous planning and consultation" by licensees which would include: (1) a "canvass of the listening public who will receive the signal and who constitute a definite public interest figure;" and (2) "consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor—professional and eleemosynary organizations, and others who bespeak the interest which make up the community."<sup>82</sup> Again, this constituted a more detailed variation of the approach which had been in place since the 1930s.<sup>83</sup> To be sure, the 1960 version was substantially

<sup>78</sup> *Id.* at 2312 (emphasis added).

<sup>79</sup> *Id.* at 2314 (emphasis added).

<sup>80</sup> *Id.*

[T]he major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (1) [sic] news programs (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.

*Id.* But the Commission hastened to point out that these itemized elements "are neither all-embracing nor constant" and re-emphasized "that they do not serve and have been intended as a rigid mold or fixed formula for station operation." *Id.*

<sup>81</sup> *Id.* at 2316.

<sup>82</sup> *Id.*

<sup>83</sup> Communications Act of 1934, Pub. L. No. 73-416, § 307(b), 48 Stat. 1064, 1084.

more detailed, but the basic concept was the same. The Commission was looking to the licensee to jump through certain hoops in order to inform itself of the needs and interests of the community—the theory being that, having jumped through the hoops, the now informed licensee would automatically and ineluctably be driven to provide programming responsive to those needs and interests.

In the *En Banc Programming Inquiry* the Commission articulated that expectation explicitly:

By the care spent in obtaining and reflecting the views [through the canvass and consultation process], which clearly cannot be accepted without attention to the business judgment of the licensee if his station is to be an operating success will the standard of programming in the public interest be best fulfilled. . . . It is the composite of [the community input], led and sifted by the expert judgment of the licensee, which will assure to the station the appropriate attention to the public interest which will permit the Commission to find that a license may issue.<sup>84</sup>

In other words, the Commission was relying on the broadcaster's enlightened self-interest to guarantee public interest programming. The Commission assumed that "operating success" would result because the "business judgment" of every broadcaster would compel him to "reflect the views" (in his programming) of the various community representatives with whom he consulted. Yet again, the Commission stopped short of imposing any specific, mandatory programming regimen on broadcasters.

The basis for the Commission's reluctance to take such a step was disclosed in the next sentence of the *En Banc Programming Inquiry*:

By [the broadcaster's] narrative development, in his application, of the planning, consulting, shaping, revising, creating, discarding and evaluating of programming thus conceived or discussed, the licensee discharges the public interest facet of his business calling *without Government dictation or supervision* and permits the Commission to discharge its responsibility to the public *without invasion of spheres of freedom properly denied to it*.<sup>85</sup>

Clearly, the Commission was consciously declining to involve itself in any substantive regulation of programming because of concerns about "inva[ding] spheres of freedom properly denied to it," by which it presumably meant freedom of speech guaranteed by the First Amendment and Section 326 of the 1934 Act.

The importance the Commission attached to the community contacts submissions led the Commission to consider revisions to the form and contents of reports which broadcasters would be required to submit. In other words, it was a replay of the *Blue Book* conclusions fourteen years earlier, and the *Blue Book* had done little beyond the agency's practice for a decade before then.

The *En Banc Programming Inquiry* thus revealed an ambivalent, if not contradictory, agency. On the one hand, the Commission appears to have

<sup>84</sup> EN BANC PROGRAMMING INQUIRY, *supra* note 74, at 2316.

<sup>85</sup> *Id.* at 2316–17 (emphasis added).

been far more willing in 1960 than previously to characterize issue-responsive, locally-oriented programming as obligatory in some inchoate sense. On the other hand, the Commission expressly acknowledged that it was not involving itself in defining such programming or in providing any useful or useable criteria, guidelines, norms, etc., to govern such programming. It made clear that its refusal to do so was based on the agency's perceived limit to its authority.

#### D. 1960's-1970's: A Preponderance of Procedures

This dichotomy reveals an important truth about the Commission's historical treatment of localism. While the Commission was willing to suggest issue-responsive, locally-oriented programming was obligatory, the Commission in fact viewed itself as unable to mandate the provision of such programming.

Faced with the perceived public interest importance of such programming on the one hand, and a perceived incapacity to require the provision of such programming on the other, the Commission continually resorted to increasingly elaborate regulatory devices that it felt it could permissibly utilize. The Commission's goal was to create a regulatory system which, if complied with, would effectively (but indirectly) compel broadcasters to do something which the FCC could not obligate them to do. The Commission built that system entirely on the assumption that compliance with the various non-programming rules would drive broadcasters to provide acceptable public interest programming, because that appears to be the only approach the Commission felt itself able to take.

Those mechanisms—a number of which had been in effect in one form or another since the earliest days of broadcast regulation—included requirements that:

- each broadcast licensee maintain a main studio in the community of license, from which a majority of the station's programming had to originate;<sup>86</sup>
- each broadcast licensee maintain, at its main studio or elsewhere in its community of license, a local public inspection file containing information

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<sup>86</sup> See, e.g., Program Origination, *supra* note 66. See also *In re* Amendment of Parts 1 and 73 of the Commission's Rules and Regulations Pertaining to Main Studio Location of FM and Television Broadcast Stations, *Report and Order*, 27 F.C.C.2d 851 (Feb. 10, 1971) [hereinafter Main Studio I]; *In re* Reiteration of Policy Regarding Enforcement of Main Studio Rule, 55 Rad. Reg.2d (P&F) 1178 (1984); *In re* Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules and Program Origination Rules for Radio and Television Stations, *Report and Order (Proceeding Terminated)*, 2 F.C.C.R. 3215, ¶ 2 (Apr. 16, 1987) [hereinafter Main Studio II].

about the station's operations, which file would be available to the public during regular business hours;<sup>87</sup>

- each broadcast licensee maintain detailed logs (representative samples of which were submitted to the Commission for its review with the station's renewal application) which delineated, *inter alia*, the station's local programming,<sup>88</sup> while the processing of license renewal applications included consideration of the quantity—but generally not the quality—of local programming reflected in the application;<sup>89</sup>

- each broadcast licensee undertake extensive, formalized efforts to apprise themselves of the needs and interests of the community and to establish lines of direct communication between community representatives and the station;<sup>90</sup>

- renewal applicants broadcast public notices concerning the renewal process and inviting members of the public to submit comments on the renewal applicant's performance during the preceding license term.<sup>91</sup>

During the two decades following the *En Banc Programming Inquiry*, all of these devices were in place. During that time, the Commission found only a small handful of licensees who were arguably undeserving of renewal due to program-related considerations.<sup>92</sup> The fact that the Commis-

<sup>87</sup> See e.g., 47 C.F.R. § 73.3526 (2006); Office of Commc'n of United Church of Christ v. FCC, 707 F.2d 1413, 1427–28 (D.C. Cir. 1983); Main Studio II, *supra* note 86, ¶ 38.

<sup>88</sup> See e.g., *In re Reregulation of Radio and TV Broadcasting*, Order, 69 F.C.C.2d 979, 1002–1008 (Sept. 22, 1978) *Office of Commc'n of United Church of Christ*, 707 F.2d at 1422.

<sup>89</sup> See e.g., *In re Amendment of Section 0.281 of the Commission's Rules: delegations of authority to the Chief, Broadcast Bureau*, Order, 59 F.C.C.2d 491 (May 6, 1976); *In re Applications of Intercontinental Radio, Inc. For Renewal of License of Station KSOL(FM) San Mateo, California Afro-American Communications San Mateo, California San Mateo Broadcasting Company, Inc. San Mateo, California For Construction Permit*, *Comparative Hearing*, 98 F.C.C.2d 608, ¶¶ 16–18 (July 17, 1984) (showing an assessment of a renewal applicant's program performance includes references to local source of programming).

<sup>90</sup> See e.g., EN BANC PROGRAMMING INQUIRY, *supra* note 74; *In re Primer on Ascertainment of Community Problems by Broadcast Applicants*, Part I, Sections IV-A and IV-B of FCC Forms, *Report and Order*, 27 F.C.C.2d 650 (Feb. 18, 1971); *In re Ascertainment of Community Problems by Broadcast Applicants*, *Memorandum Opinion and Order*, 61 F.C.C.2d 1 (Sept. 15, 1976).

<sup>91</sup> See *In re Amendment of Section 1.580(m)(1)(iii) of the Rules, Governing Text of Licensee Notice to Public of Broadcast Renewal Application Filings*, *Memorandum Opinion and Order*, 36 F.C.C.2d 685, ¶ 3 (Aug. 22, 1972).

<sup>92</sup> See, e.g., *In re Applications of Moline Television Corp. (WQAD-TV), Moline, Ill. For Renewal of License of WQAD-TV; Community Telecasting Corp., Moline, Ill. For Construction Permit*, Decision, 31 F.C.C.2d 289 (Aug. 20, 1971); *In re Application of National Broadcasting Company, Inc. For Renewal of License of Station WRC-TV, Washington, D.C.*, *Memorandum Opinion and Order*, 52 F.C.C.2d 273 (Mar. 19, 1975); *In re Application of Talton Broadcasting Company For Renewal of License of Station WHBB, Selma, Alabama*, *Memorandum Opinion and Order*, 58 F.C.C.2d 169 (Feb. 19, 1976); *In re Application of Vogel-Hendrix Corporation For Renewal of License of Station WAMA*,

sion identified any such situations at all might suggest that the system was working. In January 1970, there were already more than 7,500 licensed stations.<sup>93</sup> So in each renewal cycle the FCC had the opportunity to assess 7,500 programming performances. Considering the number of programming showings thus available to be considered, the very small handful of instances in which a licensee's performance was questioned is at most insignificant.

## V. DEREGULATION: DISMANTLING THE PROCEDURES

This is especially true in view of the fact that, during the same period, hundreds of licenses were renewed, without comment, by the Broadcast Bureau with the Commission's blessing, despite serious concerns about those stations' programming performance. Unfortunately, there is no easily researchable record concerning those hundreds of situations because of the way the Commission handled them. Under the Commission's delegations of authority, the Broadcast Bureau was authorized to act on renewal applications in which certain quantitative benchmarks were met.<sup>94</sup> In a number of cases, the Bureau elected to act, but not before advising the Commission of the intended actions and giving the full Commission an opportunity to direct some other approach. The Commission gave no such alternate direction—in fact, the majority of the Commission issued no opinion at all, as a result of which the Bureau simply granted the applications without comment or explanation.

It appears from the dissenting opinions of Commissioners Cox and Johnson that the Bureau may not in fact have had the delegated authority to act

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Selma, Alabama, *Memorandum Opinion and Order*, 58 F.C.C.2d 495 (Feb. 19, 1976); *In re Applications of Leflore Broadcasting Company, Inc. (WSWG-AM) Greenwood, Mississippi Dixie Broadcasting Company, Inc. (WSWG-FM) Greenwood, Mississippi For Renewal of Licenses, Decision*, 65 F.C.C.2d 556 (July 13, 1977).

<sup>93</sup> Public Notice, Broadcast Station Totals for January 1970, <http://www.fcc.gov/mb/audio/totals/pdf/19700131.pdf>.

<sup>94</sup> The FCC's delegations of authority provided yet another very indirect mechanism for the promotion of public interest programming. The Broadcast Bureau was given delegated authority to act on renewal applications in which the applicant proposed a certain minimum amount of non-entertainment programming (*i.e.*, news, public affairs, or other non-entertainment material). For AM stations, the minimum was 8%; for FM, 6%; for TV, 10%. *See, e.g., In re Deregulation of Radio, Report and Order (Proceeding Terminated)*, 84 F.C.C.2d 968, 975 (Jan. 14, 1981). Applications proposing less than the relevant minimum would be referred to the full Commission for consideration. This provided an incentive for every renewal applicant to propose the appropriate minimum in order to avoid the bureaucratic delays and potential complications inherent in suffering review by the full Commission. The incentive, of course, had nothing to do with any benefit to the public. Rather, the licensee was enticed to provide at least the minimum so the licensee might secure more expedited (and presumably less rigorous) review of its renewal application.

on all of those applications.<sup>95</sup> In any event, it is clear from the detailed dissents of Commissioners Cox and Johnson that many of the stations which were granted renewals presented minimal, if any, public interest programming.<sup>96</sup>

Dissenting Commissioners Cox and Johnson's analyses, while arguably not concluding that the licensees in question failed to provide adequate public interest programming, certainly give rise to legitimate questions concerning the actual program performance delivered by the licensees in question. They also give rise to legitimate questions as to the actual level of concern on the Commission's part about program performance. With one or two Commissioners raising serious doubts about particular applications based on the *Blue Book* and the *En Banc Programming Inquiry*, the fact that the Commission merely rubberstamped (without explanation) the Bureau's decision to grant those applications suggests an agency that was not eager to wade into program-based decision making.<sup>97</sup> To some degree, the Commission's decision to grant these renewals despite apparent lack of public interest programming merely echoed the agency's historical practice, as reflected in both the *Blue Book* and the *En Banc Programming Inquiry*. But these latter day actions differed from those earlier actions. Unlike the earlier actions, the Commission in the late 1960s and early 1970s did not wring its hands and commit to trying to impose additional

<sup>95</sup> *In re* Renewal of Standard Broadcast Station Licenses, 7 F.C.C.2d 122, 132 (Jan. 25, 1967) (Comm'r Johnson, dissenting) ("Whether the authority to issue the renewals has been delegated by the Commission to the Bureau is unclear.").

<sup>96</sup> *See id.*; *see also In re* Applications for Renewal of Standard Broadcast and Television Stations, *Applications*, 11 F.C.C.2d 809, 810 (Jan. 24, 1968) (Comm'r Johnson, dissenting). Commissioner Johnson objected to the "Commission's virtually complete lack of concern for the programming performance and proposals of licensed stations."); *In re* Applications for Renewal of Standard Broadcast and Television Licenses for District of Columbia, Maryland, Virginia, and West Virginia, *Application*, 21 F.C.C.2d 35 (Sept. 24, 1969) (Comm'rs Cox and Johnson, dissenting); *In re* Application For Renewal of Broadcast Licenses for Alabama and Georgia, *Application*, 25 FCC2d 801 (Mar. 29, 1967) (Comm'r Cox, dissenting); *In re* Renewals of Broadcast Licenses for Arkansas, Louisiana and Mississippi, 42 F.C.C.2d 3 (May 31, 1973) (Comm'r Johnson, dissenting).

<sup>97</sup> According to Commissioner Johnson, the majority of the Commission was endorsing, *sub silentio*, a marketplace approach to public interest programming. As described by Johnson, that approach followed this line of logic:

The only feasible way to administer standards of programing quality is in the marketplace. Let the broadcaster program what he will. So long as (1) the broadcaster seeks to maximize profit, (2) advertising revenue is based on size of audience, and (3) a given market is served by competing stations, a station owner must program to interest the public. ("The public interest is what interests the public.") When his programing quality falls below a given level, or commercial content rises too high, he will lose audience, his advertising rates will decline, and ultimately he will be driven out of the market and into bankruptcy.

*In re* Renewal of Standard Broadcast Station Licences, 7 F.C.C.2d 122, 131 n.4 (Jan. 25, 1967) (Comm'r Johnson, dissenting). Neither the majority of the Commission, nor any individual member of that majority, took exception to Johnson's characterization.

regulatory devices that might improve programming performance in some way. Indeed, but for the extensive and detailed analyses of Cox and Johnson, the questionable performances which were being swept under the rug would have been successfully swept under the rug. How many times did this occur and disappear into the ether without a dissenting commissioner to preserve for the Commission's general lack of interest in a given licensee's performance?

Commissioner Johnson's suggestion that the Commission had endorsed a marketplace approach to public interest programming was expressly validated in 1981. Concluding a proceeding commenced in 1979, the Commission commenced the dismantling of the elaborate structures it had developed in an effort to prod, indirectly, broadcasters to provide public interest programming. In *Deregulation of Radio*, the Commission eliminated program logging, program reporting (in the renewal application or otherwise), and formalized ascertainment.<sup>98</sup> The Commission concluded that such mechanisms were not necessary to assure the provision of public interest programming. Rather, the competitive marketplace was seen as the most effective and appropriate determinant for programming decisions.<sup>99</sup>

Of course, the Commission included vague threats that it might interject itself into the programming arena if it were to suspect that the private marketplace was not effective.<sup>100</sup> But those threats were hollow, at best, because—as the United States Court of Appeals for the D.C. Circuit recognized in its two remands of the elimination of the logging requirement—by abandoning the monitoring devices which might have permitted some rational assessment of the actual quantity—but not the quality—of such pro-

<sup>98</sup> *In re Deregulation of Radio, Report and Order (Proceeding Terminated)*, 84 F.C.C.2d 968, 975 (Jan. 14, 1981). See also *In re Deregulation of Radio, Memorandum Opinion and Order*, 87 F.C.C.2d 796 (July 30, 1981); Office of Comm'n of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); *In re Deregulation of Radio, Second Report and Order (Proceeding Terminated)*, 96 F.C.C.2d 930 (Mar. 1, 1984); Office of Comm'n of the United Church of Christ v. FCC, 779 F.2d 702, 704 (D.C. Cir. 1985); *In re Deregulation of Radio, Memorandum Opinion and Order (Proceeding Terminated)*, 104 F.C.C.2d 505 (May 1, 1986). The *Deregulation of Radio Report and Order* of 1981 was followed in short order by *In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 F.C.C.2d 1076 (June 27, 1984).

<sup>99</sup> In its initial review of *Deregulation of Radio*, the D.C. Circuit remanded for some additional agency explanation of the abandonment of the program logging requirement. The court was concerned that the lack of any detailed record of a station's historical programming would make it difficult, if not impossible, to meaningfully evaluate the nature and extent of a renewal applicant's performance. On remand, the Commission adhered to its initial position that detailed logging should no longer be required, but the court was still reluctant to accept that supplemented explanation. *Office of Comm'n of the United Church of Christ*, 779 F.2d at 704. The court ultimately affirmed the abandonment of program logs in the television deregulation proceeding (which paralleled the radio deregulation proceeding). *Id.* at 712.

<sup>100</sup> See *id.* at 709.



gramming (*i.e.*, program logging in connection with regular, standardized reporting), the Commission made it effectively impossible, or at least highly unlikely, that it would ever be able to make such an assessment in the future.

The court's concern about the abandonment of logging was also based on the perceived need to make available to the public (in each station's local public file) programming records, and the court declined to affirm the elimination of logging until the Commission satisfactorily addressed that point. But after two additional opportunities for the FCC to explain itself, the court was assured by the Commission that the continued availability of the public file requirement, in combination with a new "issues/programs list" requirement, would give members of the public ample information on which to formulate either petitions to deny or comparative renewal applications aimed at bringing to the Commission's attention the supposed shortcomings of undeserving licensees.<sup>101</sup>

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<sup>101</sup> *Id.* at 712. In its initial review of *Deregulation of Radio*, the court addressed the argument, presented by several petitioners, that the FCC was unlawfully foreswearing any type of non-entertainment programming regulation. The court rejected that argument, asserting that, notwithstanding the scope of the Commission's deregulatory steps, a statutory obligation to provide information programming remained and the Commission's new approach was consistent with that obligation. *Office of Commc'n of the United Church of Christ*, 707 F.2d at 1426-30. But the court's discussion of that issue includes the candid acknowledgement that "[n]either the Act itself nor the legislative history necessitates a Commission requirement that licensees offer a particular type of programming—*e.g.*, religious, educational, etc. In fact, Congress in the past has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities." *Id.* at 1430; see also *id.* at 1429 ("[T]he Act provides virtually no specifics as to the nature of those public obligations inherent in the public interest standard.").

The D.C. Circuit Court determined that the existence of some public interest programming obligation could be confirmed by the fact that the Commission's "consistent course of administrative conduct" vis-à-vis the supposed public interest programming obligation had not been overturned by legislation. *Id.* at 1403 n.50. But, as we have seen in the historical analysis thus far, the Commission's regulatory approach in this area was little more than "do as I say, not as I do." That is, while the Commission repeatedly made expansive statements about the supposed importance of issue-responsive, locally-oriented public interest programming, the Commission took virtually no meaningful actions expressly mandating or even defining such programming, much less penalizing any failure to provide such programming.

While the court in *Office of Commc'n of the United Church of Christ* repeatedly asserted that some public interest programming obligation was inherent in the 1934 Act, the only specific provision it could cite was the 1959 amendment which led to the establishment of the Fairness Doctrine. *Id.* at 1429. Of course, the Fairness Doctrine has long since been abandoned by the Commission, with the court's blessing. *Id.* at 1431-32. Moreover, to the extent that the 1959 amendment reflects anything, it is that, when Congress believes that some programming-related obligation should be specified, it is capable of specifying it. Congress's acknowledged failure to specify any particular public interest programming obligation may properly be interpreted as an indication that no such obligation has in fact been intended.

Deregulation was affirmed, largely because the Commission convinced the court that the availability to the public, in each station's local public file, of periodic issues/program lists describing to some limited degree the station's issue-oriented programming would be sufficient to inform the public—and, through the public, the Commission—of any licensee who might not be performing adequately.<sup>102</sup>

But through gradual relaxations of the main studio rule, any notion of that requirement tethering a station to a particular community vanished. And, since the public file is required to be kept at the main studio, the practical availability and utility of the public file to members of the public in the community of license vanished as well. Under the current terms of the main studio rule, a station's main studio may be located according to any one of three criteria. First, it can be in the station's community of license—this is a holdover of the historical requirement. Second, it can be located anywhere within twenty-five miles of the center of the community of license—this alone allows the placement of a main studio at a very considerable distance from the community. Third, the main studio can be located anywhere within the city-grade contours of any broadcast station of any service which happens to be licensed to the community in question.<sup>103</sup>

The last criterion stretches the traditional notion of a main studio, located within the community of license, assuring some locally-responsive programming beyond credulity. The city-grade contour of a Class C FM station with maximum facilities can reach out to a radius of twenty-five to fifty miles.<sup>104</sup> That means that clever placement of such a station's transmitter could result in the station's main studio being as many as seventy to eighty miles away from the community.<sup>105</sup>

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<sup>102</sup> Although not articulated by the Commission in its defense of deregulation, the program origination component of the main studio rule was also in place at that time, presumably giving the Commission additional comfort that each station might remain an opportunity for local self-expression, as the Commission had announced decades before. See, e.g., Program Origination, *supra* note 66, at 571. But by 1987, the program origination requirement had been eliminated. Main Studio II, *supra* note 86, at 3218–19.

<sup>103</sup> See 47 C.F.R. §§ 73.1125, 73.210 (2006).

<sup>104</sup> § 73.211(b).

<sup>105</sup> We may illustrate this mind-boggling notion this way. An FM station's service area is, as a general rule, a circle whose center is the point at which the station's transmitter is located. As indicated above, a full Class C FM station can have a city-grade service area with a radius of up to fifty miles. If the licensee positions its transmitter thirty-five miles to the east of the community of license, then that community will receive the level of service required by the rules; *Id.* But the station's city-grade contour will extend forty miles or so to the east of its transmitter site, *i.e.*, away from the community of license. Since the main studio can be located anywhere within the station's city-grade contour, the studio could be located in the easternmost point of that contour, which would be seventy-five to eighty miles away from the community. And that does not merely apply to the station with the forty mile service radius. Any station licensed to the same community may avail itself of the main studio placement opportunities presented by the highest power station in that community.

To appreciate the lassitude of the current main studio requirements, consider that, under the twenty-five mile rule,<sup>106</sup> stations licensed to Crofton, Maryland, or Reston, Virginia; could lawfully set up their main studios in the Commission's lobby in Washington, since those communities are both within twenty-five miles of Washington. And to provide some idea of the remoteness of eighty miles distance, the following communities are well within eighty miles of the Commission's offices: Front Royal, Virginia; Culpeper, Virginia; Hagerstown, Maryland; Cambridge, Maryland; and Easton, Maryland.

Plainly, the main studio rule as it presently stands cannot be expected to encourage localism in any way, shape, or form. Since the local public file—the availability of which was supposed to provide the basis for possible objections—is required to be kept at the main studio, the practical utility of the public file is effectively non-existent.<sup>107</sup>

As matters now stand, then, despite some eighty years of regulatory protestations of the existence of some *obligation* to provide locally-oriented, issue-responsive programming, the record indicates that the Commission has never imposed or defined such an obligation in any meaningful way. At most, the Commission repeatedly acknowledged that licensees often plainly failed to satisfy whatever obligation may have existed, however it might have been defined, and yet the FCC repeatedly and consistently renewed their licenses. Moreover, when faced with such apparent shortfalls in performance, the most the Commission did was attempt to impose various regulatory devices by which the Commission hoped, indirectly, to encourage better performance. When those devices proved less than fully effective, more devices were imposed and more careful agency review was promised. By the 1970s, however, the Commission appeared to have abandoned even that pretense.

And then came deregulation, with which the Commission eliminated most of the regulatory devices. The devices which survived initial deregulation—main studio rule, program origination, and local public file—have since either been eliminated (program origination) or relaxed to the point where it can no longer reasonably be claimed that they advance the notion of localism.

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<sup>106</sup> § 73.1125(a)(3).

<sup>107</sup> There is at least some anecdotal evidence supporting the notion that the public file is a resource which the public does not utilize to any meaningful degree. In a petition for rulemaking filed in 2006, counsel representing a number of broadcast stations urged the Commission to eliminate the public file rule because the public never looks at the files. *In re* Amendment of Sections 73.3526 and 73.3526 [sic] of the Commissioner's Rules (The Public File Rules), *Petition for Rulemaking*, MB Docket No. 05-108 (Jan. 4, 2006) (submitted by David Tillotson) (accessible via FCC Electronic Comment Filing System). While the Commission has initially solicited comment on that proposal, it has done nothing further and the matter remains pending.

## VI. THE COMPARATIVE RENEWAL PROCESS AS A REFLECTION OF THE FCC'S AVERSION TO PROGRAM REGULATION

The history of localism as set out above indicates that, while it was willing to pay lip service to the notion of public interest programming, the Commission chronically avoided having to involve itself in the substantive evaluation of broadcast programming performance. As demonstrated by the dissents of Commissioners Cox and Johnson,<sup>108</sup> by the late 1960s-1970s, the Commission had even stopped paying lip service, choosing instead simply to grant scores or even hundreds of renewal applications without comment, notwithstanding their apparent programming deficiencies.

The Commission's historic treatment of the comparative renewal process illustrates and underscores its reluctance to take any action consistent with its repeated solemn incantations concerning some bedrock programming obligation. The comparative renewal process required the Commission to consider competing applications filed against broadcast renewal applications. Until Congress eliminated the comparative renewal process in the Telecommunications Act of 1996,<sup>109</sup> every time a broadcast licensee sought renewal of its license, anyone could prepare and file an application proposing to use the existing station's channel for a new operation. Upon the filing of such a challenge application, the Commission had to designate the renewal application and the challenge application for comparative hearing. In such a hearing the incumbent renewal applicant's programming performance during the preceding license term would be a central focus of the proofs.<sup>110</sup>

The comparative renewal process afforded the Commission an ideal opportunity to assess individual renewal applicants' performances and, in so doing, to articulate in some coherent fashion the nature and amount of programming which comprised the oft referred to, but seldom seen, bedrock obligation of public interest programming. Even if the Commission was reluctant to try to establish broad, industry-wide definitions applicable to all situations, the comparative renewal process afforded it the opportunity to articulate standards on a case-by-case basis. Moreover, in the comparative renewal context, the Commission had the luxury of a challenging applicant who was ready, willing and able to pick through the incumbent's records in order to demonstrate what flaws might exist in the incumbent's performance. The presence of a challenger meant that, if the challenger

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<sup>108</sup> See *supra* Part V.

<sup>109</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, § 204, 110 Stat. 56, 112-13.

<sup>110</sup> See, e.g., *Cent. Fla. Enter. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978); *Citizens Commc'ns Ctr. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

itself were found to be qualified, the denial of the renewal application would not result in any loss of service to the public.

Had the FCC been truly committed to the existence of some fundamental programming obligation, the Commission would have fostered the comparative renewal process. Using the comparative renewal process's case-by-case approach the FCC could have demonstrated to the broadcast industry at least the contours, if not the specifics, of that obligation.

The history of the Commission's implementation of the comparative renewal process reveals a decided antipathy to the process. This antipathy was so manifest that the U.S. Court of Appeals for the D.C. Circuit expressed concern at "the possibility that settled principles of administrative practice may be ignored because of the Commission's insecurity or unhappiness with the substance of the regulatory regime it is charged to enforce."<sup>111</sup> According to the court, from 1961 to 1978, no incumbent had lost its license on comparative grounds based on its past programming performance.<sup>112</sup> Review of the subsequent history of the comparative renewal process indicates that the Commission's perfect record was marred only once, in *In re Applications of Harriscopes of Chicago, Inc. et al.*, in which the challenger's application was granted on comparative grounds—and that result occurred only after the Commission's initial grant of the incumbent's renewal application was reversed by the court as arbitrary and capricious.<sup>113</sup>

As indicated above, the comparative renewal process was eliminated by Congress in 1996. But at that time there were a limited number of comparative renewal cases still pending at various procedural stages, and Congress provided that the elimination of the process for future purposes would not be applied retroactively to prematurely terminate such pending cases. The last comparative renewal case to be tried was *Reading Broadcasting, Inc.*<sup>114</sup> The Commission's ultimate decision in that case strongly

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<sup>111</sup> *Cent. Fla. Enter.*, 598 F.2d at 58. The Commission had, in 1970, attempted to overhaul the comparative renewal process in a way which would have effectively guaranteed success for the renewal applicant in virtually every case. The Court of Appeals rejected that attempt. *Citizens Commc'ns Ctr.*, 447 F.2d at 1214. The Commission's distaste for the comparative renewal process lived on nevertheless. In 1988, the court observed that Chairman Mark Fowler had characterized the comparative renewal process as a "notably Marxist notion." *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 n.6 (D.C. Cir. 1988).

<sup>112</sup> *Cent. Fla. Enter.*, 598 F.2d at 61.

<sup>113</sup> See *In re Applications of Harriscopes of Chicago, Inc. et al.* A Joint Venture d/b/a Video 44 For Renewal of License of Station WSNS-TV, Channel 44 Chicago Illinois and Monroe Communications Corporation For a Construction Permit, *Memorandum Opinion and Order*, 5 F.C.C.R. 6383 (Sept. 19, 1990). Mr. Cole was counsel for the challenging applicant in this proceeding.

<sup>114</sup> *In re Applications of Radio Broadcasting, Inc. For Renewal of License of Station WTVE(TV), Channel 51 Reading, Pennsylvania and Adams Communications Corporation For Construction Permit for a New Television Station to Operate on Channel 51, Reading,*

supports the observation that, notwithstanding its rhetoric about the existence of some fundamental public interest programming obligation, the Commission was not inclined to enforce such an obligation.

In *Reading Broadcasting*, the record established that the incumbent renewal applicant had broadcast a home shopping programming format that included "no local news and only a scant amount of issue programming."<sup>115</sup> While the incumbent sought to add some non-entertainment programming to its schedule at the end of the license term, the administrative law judge hearing the case held these efforts to be "last ditch efforts . . . to give an appearance of responsive programming."<sup>116</sup> The judge found that none of that programming was issue-responsive and concluded that the incumbent's performance was deficient.<sup>117</sup>

But on appeal to the Commission, the FCC decided that the incumbent should be renewed—even though the challenging applicant had been found fully qualified to operate a new station in place of the incumbent's.<sup>118</sup> The Commission agreed with the Administrative Law Judge that the incumbent's performance had only been "minimal,"<sup>119</sup> and not deserving of any "renewal expectancy."<sup>120</sup> But the Commission concluded that, largely because some of the incumbent's minority shareholders happened to reside in the station's service area, the incumbent was entitled to a preference because, unlike the challenger, some of the incumbent's owners might be called "local."<sup>121</sup>

The incumbent had had a five-year license term (from 1989 to 1994), during which it had demonstrated a profound nonchalance toward public interest programming. While its programming performance was no better than minimal, the fact that some of the incumbent's owners happened to live in the community of license was deemed a comparative plus because of their supposed "knowledge of and interest in the welfare of the community."<sup>122</sup> Of course, whatever "knowledge of and interest in the welfare of

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Pennsylvania, *Hearing Designation Order*, 14 F.C.C.R. 7176 (May 6, 1999). Mr. Cole was counsel for the challenging applicant in this proceeding.

<sup>115</sup> *In re Reading Broadcasting, Inc. For Renewal of License of Station WTVE(TV), Channel 51 Reading Pennsylvania and Adams Communications Corporation For Construction Permit for a New Television Station to Operate on Channel 51, Reading, Pennsylvania, Initial Decision of Administrative Law Judge Richard L. Sippel*, 16 F.C.C.R. 8309, ¶¶ 198, 199 (Apr. 2, 2001).

<sup>116</sup> *Id.* ¶ 198.

<sup>117</sup> *Id.* ¶ 246.

<sup>118</sup> *In re Reading Broadcasting, Inc. For Renewal of License of Station WTVE(TV), Channel 51 Reading Pennsylvania and Adams Communications Corporation For Construction Permit for a New Television Station to Operate on Channel 51, Reading, Pennsylvania, Decision*, 17 F.C.C.R. 14001, ¶ 1 (July 3, 2002).

<sup>119</sup> *Id.* ¶ 59.

<sup>120</sup> *Id.* ¶ 50.

<sup>121</sup> *Id.* ¶ 85.

<sup>122</sup> *Id.* (internal quotations omitted).

the community"<sup>123</sup> that might have existed had not inspired those same shareholders to seek to improve the station's performance historically, so it was not clear how the local residence could have been deemed a positive comparative attribute. That fact, however, was immaterial to the Commission.

It is fair to say that the Commission's historical approach to the comparative renewal process reinforces the observations made above. Despite repeated assertions that broadcast licensees are subject to some fundamental, bedrock programming obligation, the fact of the matter is that the Commission has historically taken no action at all to delineate the scope of that supposed obligation or, more importantly, to enforce it in any meaningful fashion.

#### VII. THE FCC'S BECHTEL PROBLEM: A BAR TO RESURRECTING MANDATED LOCALISM?

With deregulation in place for almost three decades and with the elimination of the comparative renewal process, it might appear that any discussion of localism would be unnecessary. But, as noted in the introduction to this article, the Commission opened an inquiry into localism in 2004, and has at least suggested that the results of that inquiry may be germane to the ultimate disposition of the Commission's long-pending review of its media ownership policies. Moreover, at least one other area of Commission policy, the FM allotment process, depends on assumptions arising from the Commission's localism claims. So localism apparently lives on.

While the *Localism Inquiry* remains pending, the notice of inquiry which commenced that proceeding seems to implicitly acknowledge what the foregoing review has revealed: while the Commission has referred through the years to some public interest-based obligation to provide local programming, in fact and practice the Commission has never delineated even the vaguest contours of such an obligation and has not enforced it in any meaningful sense. While the Commission may now change its way and announce the metes and bounds of that supposed obligation, eight decades of history strongly suggest that will not happen.

With respect to existing localism-based policies, the Commission may have a problem. For example, in the allotment of FM channels, the Commission assigns a relatively high priority to allotment proposals which would result in the first transmission service to a community. The underlying assumption is that when the Commission allots a channel to a community and it becomes a transmission service for that community, the station to be operated on that channel should be expected automatically to provide

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<sup>123</sup> *Id.*

local service directed to the needs and interests of that community—the so-called *Tuck* policy.<sup>124</sup>

While that assumption may have been a reasonable prediction for the agency to make in 1946, or 1960, or maybe even 1980, it is impossible to justify it at this point in time. As we have seen, despite FCC efforts over decades, the agency itself has repeatedly concluded that stations were not necessarily providing the locally-oriented, issue-responsive programming which was supposedly required of them. As we have also seen, the only steps which the Commission took involved the imposition of various procedural devices which were devised with the hope that they might indirectly lead licensees down the path of public interest programming. But most of those devices were eliminated more than twenty-five years ago, and the rest have been stretched beyond utility. Thus, the Commission cannot legitimately claim that it hopes or expects that its procedural rules will result in locally-oriented, issue-responsive programming, because those procedural rules are gone.

The Commission's continued application of the *Tuck* policy is thus subject to the same challenge that was launched, successfully, against the comparative integration policy in *Bechtel v. FCC*.<sup>125</sup> *Bechtel* involved a Commission policy for comparing competing applicants for new authorizations. In a bout of pre-Kantian logic, the FCC's pure reasoning trumped any notion of empiricism. The policy, which was based on the FCC's prediction concerning the future performance of certain applicants for new broadcast authorizations, was set out in a policy statement issued in 1965 and had been implemented routinely in hundreds of cases for the next twenty-five years.<sup>126</sup> But as the appellant in *Bechtel* demonstrated, during those twenty-five years the FCC never bothered to ascertain whether the prediction underlying the policy was in fact valid in the real world. The Commission never checked the results of comparative proceedings decided pursuant to the integration policy in order to confirm whether the expected results were in fact achieved.<sup>127</sup> Moreover, as the *Bechtel* appellant further demonstrated, in the intervening twenty-five years the revision of other Commission policies substantially undermined the validity of the Commission's initial prediction.<sup>128</sup>

Since the integration policy was based on an unsubstantiated guess whose validity was inconsistent with multiple other considerations, includ-

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<sup>124</sup> See, e.g., *In re Applications of Faye and Richard Tuck, Inc. KBEC, Waxahachie, Texas, Bluebonnet Radio Broadcasters, Inc. Plano, Texas, Century Broadcasting Corporation Garland, Texas, Dontron, Inc. KPBC, Garland, Texas, For Construction Permit for a New AM Station, Memorandum Opinion and Order*, 3 F.C.C.R. 5374, ¶¶ 3-5 (Aug. 24, 1988).

<sup>125</sup> 10 F.3d 875 (D.C. Cir. 1993). Mr. Cole was counsel for the appellant.

<sup>126</sup> *Id.* at 877.

<sup>127</sup> *Id.* at 880.

<sup>128</sup> See *id.* at 878.



ing revised Commission policies and conventional behavior on the part of applicants, the court concluded that the integration policy was arbitrary and capricious.<sup>129</sup>

The same result could be reasonably expected if the Commission were to award a contested FM channel to a particular community based on the *Tuck* assumption that the channel will automatically result in a service directed to the needs and interests of its community of license. While that assumption might have been justified decades ago, it cannot be said to be valid in 2007.

#### VIII. REVELATIONS

It is important to recognize that many broadcasters do provide locally-oriented, issue-responsive programming. That, of course, is one of the hallmarks of American broadcasting. But they do so not because of some FCC-imposed localism obligation, but rather because that is what they believe to be the best way to attract and serve their audiences and thereby succeed in the competitive marketplace. The fact that the Commission has been unable or unwilling since its earliest days to define and/or enforce any such obligation is immaterial to such broadcasters, and that is as it should be.

But it is also idle for the Commission to believe that, just because the Commission raises its regulatory eyebrows and huffs and puffs about some localism obligation, there exists any such obligation which the Commission is able to articulate, much less enforce. That has not been the case since the Federal Radio Commission eighty years ago, and it is not the case today.

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<sup>129</sup> *Id.*